LIBRARY
SUPREME COURT, U. S.

FILED
DEC 24 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 143

STANLEY MARKIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES HANKEN
PHILIP BAROFF
240 Fairfield Avenue
Bridgeport, Connecticut

ALFRED BELINKIE
1016 Broad Street
Bridgeport, Connecticut

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

Opinions of the Court Below 1

Statement of Jurisdiction 2

Questions Presented 2

Statutes, Rules, Constitutional Provisions, and Regulations Involved 4

Statement of the Case 10

Statement of Facts 12

Reasons for Granting the Writ 13

Conclusion 39

Table of Authorities

Cases:

Acklen v. State of Tennessee, 267 S. W. 2d 101 (Tenn. 1954) 17

Albertson v. Subversive Activities Control Board, 34 U. S. L. Week 4014 ..... 15, 16

Bucur v. United States, 194 F. 2d 297 (7 Cir. 1952) 30

Fabacher v. United States, 84 F. 2d 602 (5 Cir. 1936) 30

Fahy v. Conn., 375 U. S. 85 (1963) 35

Giordenello v. United States, 357 U. S. 480 (1957) 3, 13, 23, 24, 25, 26

PAGE

Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931) 33, 34
Gouled v. United States, 255 U. S. 298 (1921) 33, 34
Gubelman v. Ands Koch, Inc., 234 N. Y. 425, 138 N. E. 81 (1925) 30, 31

Hoffman v. United States, 341 U. S. 479 (1951) 15
Horning v. District of Columbia, 48 App. D. C. 380 20
Horning v. District of Columbia, 254 U. S. 135 20

Kinard v. U. S., 96 F. 2d 522 (C. A. D. C. 1938) 20, 23
Kirby v. United States, 174 U. S. 47 (1899) 27

Lewis v. United States, 348 U. S. 419 (1955) 2, 13, 14, 15, 16, 18

Malloy v. Hogan, 378 U. S. 1 (1964) 15, 18
Marron v. United States, 275 U. S. 192 (1927) 3, 14, 32, 33, 34
Marshall v. United States, 360 U. S. 310 (1959) 38
Morton v. United States, 60 F. 2d 696 (7 Cir. 1932) 30
Murphy v. Waterfront Commission of New York, 378 U. S. 52 (1964) 18

Poldo v. United States, 55 F. 2d 866 (9 Cir. 1932) 23

Sansone v. U. S., 380 U. S. 343 ..... 2, 19, 20
Sparf v. U. S., 156 U. S. 51 ..... 2, 19, 20
State v. Devine, 149 Conn. 640, 183 A. 2d 612 (1962) 18
State v. McLaughlin, 132 Conn. 325, 44 A. 2d 116 (1945) 18
State v. Miller, 152 C. 343 (1965) 35
Stevenson v. U. S., 162 U. S. 313 (1896) 2, 19, 20

PAGE

United States v. Bosch, 209 F. Supp. 15 (1962) 24
United States v. Boyette, 299 F. 2d 92 (1962) 33
United States v. Calamaro, 354 U. S. 351 36
United States v. Gjanci, —— F. 2d —— (1965) 22
United States v. Glass, 277 F. 2d 566 (7 Cir. 1960) 30
U. S. v. Grassia, —— F. 2d —— (1965) 37
United States v. Interbartolo, 192 F. Supp. 587 25
United States v. Kahriger, 345 U. S. 22 (1953) 2, 13, 15, 16, 18, 36, 37
United States v. Lefkowitz, 285 U. S. 452 ..... 33, 34
United States v. Mungioli, 233 F. 2d 204 (3 Cir. 1956)..... 17
United States v. Murdock, 290 U. S. 389 21
United States v. Office No. 508 Ricou-Brewster Bldg., 119 F. Supp. 24-28 (1954) 24
United States v. Palermo, 259 F. 2d 872 (3 Cir. 1958) 21
United States v. Rabinowich, 238 U. S. 78 (1915) 18
U. S. v. Sansone, 334 F. 2d 287 (8 Cir. 1964) 20
United States v. Spies, 317 U. S. 492 (1943) 21
U. S. v. Viale, 312 F. 2d 595 38
United States v. Fred Washington, 253 F. 2d 913 (7 Cir. 1958) 29

Young v. U. S., 309 F. 2d 662 (C. A. D. C. 1962) 22

Washington v. United States, 357 U. S. 348 (1957) 29

U. S. Constitution:

Fourth Amendment 7, 32, 34
Fifth Amendment 7, 15, 34
Sixth Amendment 8, 27
Tenth Amendment 8, 38

PAGE

RULES:

Federal Rules of Criminal Procedure:

Rule 3 9
Rule 4(a) 9, 24, 27
Rule 5(b) 26
Rule 31(c) 10, 13
Rule 41(b)(2) 3, 10, 14, 32

STATUTES:

68A Stat. 525 (1954), 26 U. S. C. § 4401 (1958) 4
68A Stat. 527 (1954), 26 U. S. C. § 4411 (1958) 5, 16
68A Stat. 527 (1954), 26 U. S. C. § 4412 (1958) 5, 16
68A Stat. 732 (1954), 26 U. S. C. § 6011 (1958) 7, 16, 17
68A Stat. 851 (1954), 26 U. S. C. § 7203 (1958) 6, 18, 23
26 U. S. C. § 7262 ..... 6, 18, 23
26 C. F. R. § 44.4412-1(B)(2) 8, 17
34 F. R. D. 411, 415 (1964) 26, 27

Connecticut General Statutes, 1958 Rev.

Sections 53-271 to 53-279 17
Sections 53-295 to 53-297 17
Section 54-197 17

MISCELLANEOUS:

Wigmore on Evidence, Sec. 1362, p. 3 28
McCormick, Evidence, Sec. 273 (1954) 31
Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L. J. 229, 236, 237 (1922) 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

STANLEY MARKIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Stanley Markis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 29, 1965.

Opinions of the Court Below

The opinion of the Court of Appeals, as yet unreported, is printed in the Appendix to this Petition (P.A. 1a).[1] The opinions in *U.S.* v. *Piccioli*, Docket No. 29521 in the

[1] References are indicated as follows:
References to the numbered pages of petitioner's appendix (P.A. —a).
Reference to the numbered pages of the appendix to Court of Appeals (A. —a).
References to the numbered pages of the record (R. —).

Court of Appeals, *U.S.* v. *Grassia,* Docket No. 29791 in the Court of Appeals, *U.S.* v. *Costello, Marchetti* and *Gjanci,* Docket No. 29524 in the Court of Appeals, *U.S.* v. *Costello,* Docket No. 29525 in the Court of Appeals, *U.S.* v. *Marchetti,* Docket No. 29526 in the Court of Appeals, and *U.S.* v. *Gjanci,* Docket No. 29527 in the Court of Appeals, related cases, also are printed in the Appendix (P.A. 28a, 36a, 13a).

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on October 29, 1965. Petitioner's Petition for rehearing was denied on November 26, 1965. This Petition is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Should *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

2. Is it not reversible error to refuse to instruct as to the lesser-included offense under Rule 31(c), Federal Rules of Criminal Procedure, when the requirements for such instruction are met, as defined by *Sparf* v. *U.S.,* 156 U.S. 51 (1895); *Stevenson* v. *U.S.,* 162 U.S. 315 (1896), and *Sansone* v. *U.S.,* 380 U.S. 343 (1965)?

3. Since *Giordenello* v. *United States*, 357 U.S. 480 (1958) clearly held that essential facts supporting "probable cause" must appear on the face of an arrest complaint, did not the Court below err in deciding that such facts, although not appearing in the complaint may be found in affidavits executed four days prior to the complaint?

4. Has not petitioner been denied his right under the constitution to be confronted with the witnesses against him, when the basis for his conviction rests upon the extra judicial statements of a declarant who was not subject to cross-examination?

5. Is *Marron* v. *United States*, 275 U.S. 192 (1927) authority for holding that rent receipts and telephone bills may be seized by virtue of F.R.Cr.P. 41(b)(2) as "instrumentalities of the crime" of accepting wagers without having registered or paid the tax and, if so, should the decision be reconsidered by this Court in the light of recent decisions?

6. Assuming, *arguendo*, the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

Statutes, Rules, Constitutional Provisions, and Regulations Involved

68A Stat. 525 (1954), 26 U.S.C. § 4401 (1958): *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U.S.C. § 4411 (1958): *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U.S.C. § 4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his dele-

gate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U.S.C. § 7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 7262. *Violation of occupational tax laws relating to wagering—failure to pay special tax*

Any person who does any act which makes him liable for special tax under subchapter B of Chapter 35 without having paid such tax, shall, besides being liable for the payment of the tax, be fined not less than $1,000 and not more than $5,000.

68A Stat. 732 (1954), 26 U.S.C. § 6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Amendment IV—Searches and Seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amend. V, U.S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI, U.S. Const.: *Jury Trial for Crimes, and Procedural Rights.*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amend. X, U.S. Const.: *Reserved Powers to States.*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

26 C.F.R. § 44.4412-1 (B)(2): *Registration.*

(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such

supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

Rule 3 of Federal Rules of Criminal Procedure:

THE COMPLAINT.

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4(a) of Federal Rules of Criminal Procedure:

ISSUANCE. "(a) If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons a warrant shall issue."

Rule 31(c) of the Federal Rules of Criminal Procedure:

"(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Rule 41. Search and Seizure:

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense;

Statement of the Case

The action was commenced against petitioner by criminal information and he was arrested on October 8, 1964 in a massive raid throughout Bridgeport, Connecticut. On October 8, 1964, a press release which had previously been given to newsmen, announced that approximately forty-five persons engaged in various gambling activities were arrested in a spectacular thrust at the extensive gambling activities in this area, by seventy-five special agents aided by fifty State Policemen. Extensive newspaper, radio and television coverage prevailed in Bridegport and elsewhere in Connecticut. Statements by the Chief Assistant United States Attorney such as the government "had broken the back of gambling" in Bridgeport were reported in the Bridegport Post.

On November 30, 1964 approximately forty-seven gambling cases were assigned for trial at Bridgeport, and four

juries including petitioner's were selected on November 30th and December 1st from the same panel of veniremen. All four cases involved similar substantive charges of gambling tax violations and the same Internal Revenue Agent was the chief government witness in the first three cases. Petitioner's jury was then excused until the trial of Costello, Marchetti, Gjanci and Piccioli was completed, and his trial commenced on January 5, 1965. (A. 5a) Prior to the commencement of trial petitioner filed a motion to suppress evidence, thereafter a hearing was held on December 22, 1964 (A. 2a) and the motion was denied (A. 22a).

The jury returned a verdict of guilty on both counts of the information. Petitioner was sentenced to: Imprisonment for one year on Count 1 and a fine of $10,000. Imposition of sentence was suspended on Count 2 with probation for two years, to start upon date of release from imprisonment. Execution of sentence stayed 24 hours. Petitioner filed motions for judgment of acquittal or new trial and a subsequent motion in arrest of judgment, because of the unconstitutionality of the wagering tax statutes and the prejudicial pre-trial publicity generated by the government. Both motions were denied (A. 5a). On February 9, 1965 petitioner's notice of appeal was filed (A. 6a). The Second Circuit Court of Appeals affirmed the judgment (P.A. 12a) and petitioner's motion for rehearing was denied.

Statement of Facts

Petitioner's conviction was based on the testimony of one John Ripa, a special agent of the Internal Revenue Service. His testimony was to the effect that he had placed a number of bets with one John Mento during the period of August 19, 1964 to September 25, 1964; that he would then observe Mento dial a telephone number, ask for a person named "Joe" and repeat these bets (A. 33a-44a) and that he did not hear a voice at the other end of the line (A. 50a).

Ripa did not ask Mento to call "Joe"; in fact he didn't know who "Joe" was (A. 51a) and did not know the destination of the calls. Nor did any other government witness testify to knowing the "Joe" involved in the alleged conversations.

Mento was never called upon by the government to testify.

On Oct. 8, 1964, special agent Ryan accompanied by other officers arrived at apartment C-6, 2225 Main St., Bridgeport, Conn. After arresting petitioner a search was conducted of the apartment wherein various items were seized including thirteen cancelled telephone bills for 336-0254 in the name Mrs. Peggy Donofrio, 2225 Main St., Bridgeport (Gov't Exs. 5, 13) and fifteen rent receipts for apartment C-6 made out to "F. Scinto." Ryan then questioned petitioner, who denied that he accepted bets and didn't think he had to have a wagering stamp (*infra*, p. 21).

At the time of the arrest, Ryan possessed a "John Doe" search warrant, the affidavits supporting which were filed with the Commissioner on October 1, 1964 (A. 13a) and

a "John Doe" arrest warrant based on a complaint filed with the Commissioner on October 5, 1964 (A. 7a). No facts were stated in the complaint showing that petitioner did not have a wagering tax stamp. The complaint further omitted to state any dates when the affiant or anyone else made the alleged observations of the offense.

Reasons for Granting the Writ

1. Because this Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953) and *Lewis* v. *United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court.

2. Although in conflict with decisions of this Court, the Court of Appeals for the Second Circuit has sanctioned the refusal to apply Rule 31(c) Federal Rules of Criminal Procedure in the case at bar.

3. Unless the lower court's decision is reviewed and its apparent conflict with *Giordenello* and other decisions resolved, foreseeable dangers will arise from the decision permitting a Commissioner to determine "probable cause" from sources other than the face of the complaint.

4. This Court understandably hesitates to review questions of evidence, however, when an accused has been convicted by extra-judicial statements without the opportunity to confront and cross-examine his accuser and where the decision of the lower court is in conflict with three decisions of the Seventh Circuit Court of Appeals and a de-

cision of the Fifth Circuit Court of Appeals, justice would best be served by a re-examination of the case.

5. The Court below expressed doubt as to whether the seizure of the telephone bills and rent receipts exceeded the bounds permitted by F.R.Cr.P. 41(b)(2) or the Fourth Amendment, however it followed *Marron* "unless the Court should instruct otherwise" (P.A. 7a)

6. The conscious generation of massive pre-trial publicity by the government combined with the statements of the district court created a situation which only this Court can correct by exercising its power of supervision.

I.

"Are you engaged in the business of accepting wagers on your own account?"

"Do you receive wagers for or on behalf of some other person or persons?"

It is for his failure to answer these and more detailed inquiries contained in Internal Revenue Form 11-C (A. 31a) that petitioner has been subjected to a one year prison sentence and a $10,000.00 fine (A. 6a). As Mr. Justice Black commented in a dissent a decade ago, if a compelled response to these questions

"... would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would." *Lewis* v. *United States, supra,* 348 U.S. at 425.

In rejecting petitioner's contention that the self-incrimination clause of the Fifth Amendment protected petitioner, in the wagering tax context, from having to make any statements save those that "cannot possibly have such tendency to incriminate," *Malloy* v. *Hogan*, 378 U.S. 1, 12 (1964), the court below relied squarely upon *Kahriger* and *Lewis*. While noting, by reference, in its opinion on rehearing that *Albertson* v. *Subversive Activities Control Board*, *supra*, may lead this Court to overrule *Kahriger* and *Lewis* "insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination," the court felt that the issue was appropriate only for this Court's determination (P.A. 38).

What petitioner urges is a reappraisal of *Kahriger* and *Lewis* in the light of *Malloy* and *Albertson*.

Significantly, *Kahriger* and *Lewis* were decided without mention of the doctrine this Court firmly established in *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951): that the privilege against self-incrimination "not only extends to answers that would in themselves support a conviction . . . ; but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute . . . ," and without reference to the specific information sought by the Internal Revenue Service form involved here. *Malloy* reemphasized the link-in-the-chain principle ignored in *Kahriger* and *Lewis*; *Albertson* emphasized the questions on the Justice Department registration form, the I.R.S. counterpart of which is involved here and had been ignored in *Kahriger* and *Lewis*.

In *Kahriger* and *Lewis*, the wagering tax statutes were upheld because the Court felt they operated only prospectively and were, therefore, non-compulsory. 345 U.S. at

32, 33; 348 U.S. at 422. But by similar reasoning the *Albertson* registration provisions would have been held valid, since individual Communist Party members could terminate their membership within 30 days after entry of a § 786(a) order directed to the Party, 34 U.S.L. Week at 4014, and thus avoid individual registration. Yet this Court invalidated the registration provisions in *Albertson;* and its comments in so doing are equally applicable to the wagering tax statutes and undermine the rationale of *Kahriger* and *Lewis*:

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act . . . or under § 4(a) of the Subversive Activities Control Act . . . , to mention only two federal criminal statutes. . . . It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause." *Albertson* v. *S.A.C.B., supra,* 34 U.S.L. Week at 4016.

Here, too, the risks of incrimination are obvious. For petitioner to pay the tax required by 26 U.S.C. § 4411, thereby admitting that he was engaged in wagering, he would also be required, by 26 U.S.C. §§ 4412 and 6011, to furnish on I.R.S. Form 11-C the name and address "where each such business is conducted" and the "name and address" of each employee engaged in receiving wagers.[1]

---

[1] These questions and the more detailed inquiries are contained on I.R.S. Form 11-C which is *both* a special tax return and appli-

Disclosure in response to these questions, if not an outright admission of violations of some or all of Connecticut's anti-wagering laws, §§ 53-271 to 53-279, 53-295 to 53-297 (Conn. Gen. Stat., 1958 Rev.) or its criminal conspiracy statute, § 54-197 (Conn. Gen. Stat., 1958 Rev.),[2] would constitute at the very least a "link in a chain of evidence sufficient to connect" petitioner with such violations. 378 U.S. at 13.

Certainly the listing of employees and agents is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the business of wagering.[3] And disclosure of the place of business

---

cation for registry, which petitioner would have had to complete in order to pay the special tax prescribed by § 4411 and avoid conviction. By virtue of 26 U.S.C. § 6011(a):

> "... Every person required to make a return or statement shall include therein the information required by such forms or regulations."

The Commissioner of Internal Revenue refuses to accept receipt of the $50 for the stamp without the information required by Form 11-C. The fact that a defendant tenders payment which is refused is no defense to a subsequent prosecution for accepting wagers without payment of the $50 special tax. *United States* v. *Mungioli*, 233 F.2d 204, 205 (3 Cir. 1956).

[2] In *Acklen* v. *State of Tennessee*, 267 S.W.2d 101 (Tenn. 1954), for example, the defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp.

[3] 26 C.F.R. § 44.4412-1(b)(2) requires a person engaging or about to engage in the business of receiving wagers to submit the name of any "employee" or "agent" hired to receive wagers *within 10 days after that* "employee" is so engaged. The "employer," then, is forced to supply the name of someone who will admittedly be in a unique position to bear witness against him. And due to the 10 day delay permitted in the registration of such "employees," the information supplied would relate not only to future criminal act, but also to *past* criminal acts.

in which wagering is carried on could lead authorities to a lease, purchase of real estate, or other rental agreement for the purpose of showing overt acts in furtherance of the conspiracy. *State* v. *McLaughlin,* 132 Conn. 325, 340, 44 A.2d 116, 123 (1945). The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State* v. *Devine,* 149 Conn. 640, 649, 183 A.2d 612, 616 (1962), and need not be criminal acts in themselves. *United States* v. *Rabinowich,* 238 U.S. 78, 86 (1915).

If response to the questions asked in *Malloy,* 378 U.S. at 13-14, involved the *possibility* of self-incrimination, compelled compliance with the statutes here involved would make self-incrimination under Connecticut law a practical *certainty.*

To leave *Kahriger* and *Lewis* standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." *Murphy* v. *Waterfront Commission of New York,* 378 U.S. 52, 55 (1964).

II.

Having determined that 26 U.S.C. Sec. 7262 is a lesser-included offense of 26 U.S.C. Sec. 7203, the Court of Appeals held that petitioner was nevertheless not entitled to the requested charge.

The court below concluded that the issue of willfulness was not "as Sansone itself demonstrates" (P.A. 11a) a "truly disputed one." (P.A. 12a)

The recent case of *Sansone* v. *U.S.*, 380 U.S. 343, 350 (1965), relied upon by the court below, held that "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a *disputed factual element* which is not required for conviction of the lesser-included offense." (Italics ours.)

In deciding that petitioner, who did not take the stand, and whose exculpatory statements were introduced into evidence did not "dispute" willfulness, the court below has set precedent not in accord with the rationale of this Court's decisions in *Sparf, Stevenson* and *Sansone.*

In *Sparf* v. *United States,* 156 U.S. 51 (1895), the phrase does not appear, but this Court held that a jury might convict of the lesser-included offense *"if the evidence permitted them to do so."* (Italics ours.) 156 U.S. at p. 63.

However, in *Sparf* there "... was *an entire absence* of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault." (Italics ours.) 156 U.S. at p. 64.

Not referring to "disputed factual element", this Court in *Stevenson* v. *United States,* 162 U.S. 313 (1896) declared that "if there were *any* evidence which *tended* to show a state of facts . . ." (italics ours) which might bring the crime within the lesser-included offense then it became a proper question for the jury to say whether the evidence was true and whether the crime was the greater or the lesser. 162 U.S. at p. 314.

The case would be the same even though the evidence as to the greater offense might be "uncontradicted" and in the eyes of the court "overwhelming." 162 U.S. at p. 315.

Since *Sansone* referred to *Sparf* and *Stevenson*, it is clear that a factual element is undisputed only when there is a complete absence of evidence bearing on that element.* *Kinard* v. *U.S.*, 96 F.2d 522, 525 (C.A.D.C. 1938).

It is important to note that in *Sansone*, it was *stipulated* that the income reported in the 1957 return was earned and received.

U.S. v. *Sansone*, 334 F.2d 287, 290 (8 Cir. 1964).

Furthermore, "Petitioner *conceded* that the 1957 transaction was reportable and that in not reporting it, he understated his tax liability for that year by $2,456.48." (Italics ours.)

Sansone v. *U.S.*, 380 U.S. 343, 13 L.Ed. at 885.

In view of the stipulation and concession, the court concluded, over dissent however, that no factual dispute existed. In the instant case, however, petitioner did not take the stand and never stipulated or conceded that he acted willfully in failing to register or purchase a tax stamp.

Actually, the converse is true, in that his exculpatory declarations are tantamount to express denials of willfulness, as evidenced by Ryan's testimony:

---

* In *Horning* v. *District of Columbia*, 254 U.S. 135 (1920), cited by the lower court (P.A. 12a) this Court observed that "The external facts are not disputed . . ." 254 U.S. p. 136.

There was no dispute, however, because the defendant took the stand and "*. . . unqualifiedly admitted every charge made against him.*" (Italics ours.)

Horning v. *District of Columbia*, 48 App. D.C. 380, 384, 385. (1919)

"I asked him why he hadn't purchased a wagering stamp, and he said he didn't need one because he doesn't take bets, that he only gambles for a living."

• • • • •

"And I asked him if he was accepting wagers, would he have registered and purchased a Federal wagering stamp, and he said he would have." (P.A. 4a)

If petitioner's declarations were believed by the jury, they might have found him guilty of the lesser offense. His belief that he was not violating Federal law, on its face, negates the necessary "specific evil intent" and "evil motive" which must exist in order to establish willfulness.

United States v. *Murdock*, 290 U.S. 389 (1933);
United States v. *Palermo*, 259 F.2d 872 (3 Cir. 1958);
United States v. *Spies*, 317 U.S. 492 (1943).

The charge of the trial court which is based on the evidence, took this into consideration:

An act or omission is done wilfully—as distinguished from knowingly—if it is done voluntarily and purposely with a *specific intent to do that which the law forbids* or

—356—

voluntarily or purposely to omit to do an act or fulfill an obligation *knowing that such act or obligation is required by law.* (Italics ours.) (A. 67a)

The trial court, apparently alluding to these statements, also regarded them as exculpatory, as evidenced by his charge to the jury. (A. 72a)

• • • • •

"If you find that any exculpatory statements, that is, statements tending to indicate the innocence of the defendant, were made by the defendant, that is, by the accused, to a Government law enforcement official, if later shown to be false those exculpatory statements, if you find there were any, may be considered by you as circumstantial evidence of the defendant's guilty consciousness."

• • • • • •

Likewise, the United States District Attorney, in *United States* v. *Gjanci*, —— F.2d —— (1965), argued to the same lower court that such declarations were exculpatory. (P.A. 27a)

At the trial's conclusion, petitioner submitted nine written requests to charge on this issue. (A. 24a) Request number nine was especially applicable to the evidence in question.

"9. If you find the Defendant believed that he was not required to buy a tax stamp and to register, you must find him not guilty." (A. 26a)

Although petitioner's protestations of innocence may have appeared to the court below to be implausible, unreliable and incredible, it was for the jury alone to appraise such protestations.

Young v. *U.S.*, 309 F.2d 662, 663 (C.A.D.C. 1962).

The jury may have agreed with the trial court and the United States Attorney, that petitioner's statements were expressions of innocence of "willfulness." This, being true, petitioner had the right to have the jury decide whether or not he was guilty of violating Section 7203 or Section 7262, since clearly there was not a *complete absence* of

evidence which might tend to prove petitioner did not act "willfully."

However, by withdrawing consideration of the requested charge from the jury, the trial court, in effect, erroneously directed a verdict against the jury's finding that petitioner violated Section 7262 rather than Section 7203.

Kinard v. *U.S.*, 96 F.2d 522, 525 (C.A.D.C. 1938).

III.

This Court in the landmark case of *Giordenello* v. *United States,* 357 U.S. 480 (1957) held that ". . . in the absence of an indictment, the issue of probable cause had to be determined by the Commissioner *and an adequate basis for such a finding had to appear on the face of the complaint.*" (Italics ours.) 357 U.S. p. 487.

The complaint sets forth the affiant's mere conclusion that "said John Doe, a/k/a "Joe" or "Stash" engaged in the business of accepting wagers without having paid the wagering occupational stamp tax" (A. 7a, 8a).

Not only is the complaint completely barren of any allegations of fact in support of this conclusion, but the affiant did not even allege that he had "reason to believe" said "John Doe" had not paid the Federal Tax.* Furthermore, the complaint is defective in that it omits entirely to state the dates when the affiant or anyone else made the alleged observations of the offense.

Poldo v. *United States,* 55 F. 2d 866, 868 (9 Cir. 1932).

---

* The government's reason for the fatal omission is obvious. The records of registration would certainly not contain the fictitious name of "John Doe, a/k/a Joe" or "Stash." The meaningless allegation that this fictitious name does not appear cannot give probable cause to believe that petitioner had not complied with the law because "John Doe" did not.

Obviously, the Commissioner could not determine from the underlying facts stated on *the face of the complaint,* whether there was probable cause to believe that petitioner had failed to pay the tax, which is the essence of the crime. Therefore, according to the dictates of *Giordenello,* the arrest warrant must fall. See also *United States* v. *Office No. 508 Ricou-Brewster Bldg.,* 119 F. Supp. 24-28 (1954).

Although the court below sustained the warrant using an interpretation of F.R.Cr.P. 4(a) which is in direct conflict with that of *Giordenello,* it is noteworthy that *Giordenello* wasn't cited in the decision which permitted the Commissioner to rely on search warrant affidavits which were not even incorporated into or made a part of the complaint.

The lower court's interpretation of F.R.Cr.P. 4(a) has been advanced in the past and rejected. In *United States* v. *Bosch,* 209 F.Supp. 15 (1962), the Government urged the court to read an affidavit for a search warrant together with a complaint for arrest in order to determine whether the commissioner had sufficient probable cause to justify the issuance of the arrest warrant. The court, quoting *Giordenello* dismissed this contention:

> "In any event such affidavit is not part of the complaint the validity of which must be determined from its face."

United States v. *Bosch* at pp. 20, 21.

Since the use of affidavits to buttress complaints is not alluded to in F.R.Cr.P. 4(a), is not the use of *oral* informa-

tion to supply the missing elements of a complaint, a logical extension of the lower court's reasoning?

The Government proposed such an extension in *United States* v. *Interbartolo*, 192 F.Supp. 587 but the court, citing *Giordenello*, could not agree.

> "The oral information given by Sawtelle to the Commissioner before the warrant of arrest was issued cannot be invoked to buttress the complaint. The Supreme Court has distinctly held that an adequate basis for a finding of probable cause by the Commissioner has to appear on the face of the complaint." 192 F.Supp. at p. 593.

Petitioner's contention is solidified by the proposed amendment in 1964 to F.R.Cr.P. 4(a) by the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The proposed rule would read, " . . . If it appears from the complaint *or from an affidavit filed with the complaint* . . . "

In its explanatory note to the proposed amendment, the Committee clarifies the holding in *Giordenello*.

> "In Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 1503 (1958) it was held that to support the issuance of a warrant the complaint must contain in addition to a statement 'of the essential facts constituting the offense' (Rule 3) a statement of the facts relied upon by the complainant to establish probable cause. *The amendment permits the complainant to state the facts constituting probable cause in a*

separate affidavit in lieu of spelling them out in the complaint." (Italics ours.) 34 FRD 411, 415 (1964).

The Court of Appeals, however, attaches little significance to the Advisory Committee's proposed amendment because it "by no means establishes that the existing Rule would not be construed to permit this." (P.A. 6a)

Extreme doubt is cast upon the validity of that assumption since it seems illogical that the Committee would propose an amendment to a rule, if the existing rule already conformed to the amendment.

More important, however, is the fact that *Giordenello* and other authorities cited by petitioner, have *not* so construed the rule, nor did the court below cite case law in support of its position.

Actually, even the requirements of the proposed amendment were not met since the affidavit was filed four days before the complaint.

The Advisory Committee's proposed amendment to F.R.Cr.P. 5(b) is further support for petitioner's contention. The existing rule states that:

"The Commissioner shall inform the defendant of the complaint *against him* . . ." (Italics ours.)

Whereas, the proposed amendment reads:

"The Commissioner shall inform the defendant of the complaint against him *and of any affidavit filed therewith.* . . ." (Italics ours.)

The Committee's explanatory note is a clear indication that the decision of the court below cannot be reconciled with that of *Giordenello.*

> "The [first] change is designed to insure that under the revision made in Rule 4(a) the defendant arrested on a warrant will receive the same information concerning the basis for the issuance of the warrant *as would previously have been given him by the complaint itself.*" (Italics ours.) 34 F.R.D. 411, 415, 416.

Petitioner contends that until the proposed amendment to F.R.Cr.P. 4(a) is officially accepted, by this court, a deficient arrest complaint cannot be cured by borrowing crucial allegations from search warrant affidavits. This is especially true under the facts of the instant case, where the Commissioner never himself officially indicated what reliance, if any, he placed upon the four day old affidavits.

IV.

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."
>
> *U.S. Constitution, Amendment VI.*

Furthermore, it is settled law that the right of confrontation is the right to the opportunity of cross-examination.

This Court has long held that ". . . a fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."

Kirby v. *United States*, 174 U.S. 47, 55 (1899).

Consequently, petitioner had the constitutional right to confront Mento at the trial and cross-examine him since it is established law that assertions offered testimonially, which have not been in some way subject to the test of cross-examination, are excluded by the Hearsay Rule.

Wigmore on Evidence, Sec. 1362, p. 3.

In the instant case the jury and counsel for petitioner were, in unambiguous terms, sporadically reminded that Mento's declarations were being offered for their truth.

> "The Court: Well, let me ask the Government, in view of the objection by the defendant, is it the Government's claim that this wager, placed by the witness, Mr. Ripa, was placed with the defendant, Stanley Joseph Markis?
>
> Mr. Owens: Yes, your Honor.
>
> • • • • •
>
> The Court: Sometimes it is not possible to encompass all steps if there are more than one step in one question. But the Government has made the representations that you heard. They expect to prove that the wager, placed by the witness, Mr. Ripa, ended up being placed with the defendant, Mr. Markis. (A. 36a)
>
> • • • • •

—68—

But acting consistently with the way I have attempted to from the outset, I will reserve decision on the defendant's motion to strike, and grant leave to the Government forthwith to connect, if it is able to do so, the defendant with these conversations or the placing of these wagers to which Mr. Ripa has testified—absent which connection I of course will strike the testimony" (P.A. 41a).

* * * * *

Faced with these representations by the trial court and assistant district attorney, the jury was obligated to consider these declarations cogent proof that petitioner was in fact "Joe", the anti-phonal speaker, who on each occasion accepted the alleged wagers relayed by Mento.

Washington v. *United States,* 357 U.S. 348 (1957), reversing *per curiam United States* v. *Fred Washington,* 253 F.2d 913 (7 Cir. 1958), "because of insufficiency of the evidence" (three justices dissenting), is apparently dispositive of the issue. Actually there was more evidence in the *Washington* case, to allow the telephone calls into evidence, than exists in the instant case. In *Washington,* the agents eavesdropped on the calling end and listened to the entire conversation.

In the case at bar, Mento didn't testify and Ripa heard none of the alleged conversation emanating from the other end of the line.

Aside from the question of identity it wasn't even established that a two-way conversation had in fact taken place.

The lower court decision also conflicts with at least three decisions of the Seventh Circuit, and a decision in the Fifth Circuit.

In *Morton* v. *United States,* 60 F.2d 696, 698 (7 Cir. 1932) where four agents heard both sides of the conversations and two of the agents testified that they recognized the voice as that of Appellant, the Court held that the testimony of the other agents was admissible because their testimony was received in *corroboration of the substance* of the conversations.

The Court in *Fabacher* v. *United States,* 84 F.2d 602, 604 (5 Cir. 1936) held that where the agent had heard Appellant's voice over the telephone several times, his testimony was competent "• • • in view of his positive identification of Appellant's voice at a later time, even on the date of the trial."

In *Bucur* v. *United States,* 194 F.2d 297, 304 (7 Cir. 1952) it was held that the representation of one party to a telephone conversation that he conversed with another was in itself an insufficient proof of authentication.

In *United States* v. *Glass,* 277 F.2d 566, 569 (7 Cir. 1960) the Court cited *Bucur* v. *United States, supra,* and held that where the witness shared the receiver with one of the speakers, heard both ends of the conversation and recognized Appellant's voice, the witness "was not relying on the mere oral statement made by the party at the other end of the line as to his identity."

A similar fact pattern was presented in *Gubelman* v. *Ands Koch, Inc.,* 234 N.Y. 425, 138 N.E. 81 (1925), where the court decided that since no other witness had testified

to the entire conversation of which the bystander's testimony would be corroborative and no evidence was presented as to what the party sought to be charged said in reply to the calling party, the testimony of the bystander was incompetent.

The court noted that without such initial testimony by a witness who actually heard the entire conversation ". . . we simply have an attempt to bind a person at one end of the line by showing what was said at the other end, without any testimony in respect of the response which was made."

Gubelman v. *Ands Koch, Inc.*, p. 429.

It comes too late to now say, as does the court below, that Mento's unsworn, extra-judicial assertions were not offered for their truth. (P.A. 4a) Petitioner was tried and convicted by a jury that was not only affirmatively led to believe the contrary but was never instructed otherwise.

It is further submitted that the exception to the Hearsay Rule, referred to by the court below (P.A. 5a), is not applicable to the facts of the case, nor has it been traditionally accepted by our courts. *McCormick, Evidence,* Sec. 273 (1954).

Mento, the declarant, was not "perceiving" an "external event" which he was "narrating" to Ripa since he alone dialed 336-0524 and merely spoke into the telephone. Accordingly, Ripa's presence at the time of the utterances is meaningless. He didn't know whose number was dialed, what, if anything, was said at the other end of the line nor who might have said it and consequently, did not "perceive" petitioner accepting wagers.

See: *McCormick, Evidence,* Sec. 273 (1954).

The observation of the court below that, "It is plain that Ripa could not be allowed to testify as to what Mento said the receiver said; Mento alone could do that" (P.A. 4a), is the correct law of the case and states petitioners' position perfectly.

For all practical purposes, Mento was by implication, "saying what the receiver said" to Ripa who so testified on the stand.

The truth of these utterances depended solely on the credit of Mento, thereby emphasizing the need for confrontation and cross-examination and rendering the exception inapplicable. Furthermore, Mento was an unusually available witness to the government, but not produced in court, and under the facts of the case, there is no reason to assume his testimony to be reliable, or trustworthy, the very reasons for the existence of the exception.

See: *Morgan, A Suggested Classification of Utterances Admissible as Res Gestae,* 31 Yale L.J. 229, 236, 237 (1922).

V.

Although the court below indicated some doubt as to whether telephone bills, and rent receipts are "instrumentalities and means by which" the crime here charged was being committed, it upheld, however, the seizure of these items as not being violative of F.R.Cr.P. 41(b)(2), or the Fourth Amendment, on the basis of *Marron* v. *United States,* 275 U.S. 192, 199 (1927), "unless the Court should instruct otherwise." (P.A. 7a)

—

It is submitted that *Marron* was decided on the basis that the premises in question were being operated as a nuisance, the maintenance of which was punishable under the National Prohibition Act. The court thus concluded that the officers could seize the items used in operating the establishment. Actually, *Marron* is not as foreign to petitioner's position as the Court below intimated since this Court held that the ledgers and bills were *not* authorized by the search warrant, 275 U.S. p. 198, and the Court below has not justified the seizure in the instant case as being an incident to a lawful arrest, as in *Marron*.

The rationale of *Marron*, therefore, cannot encompass the facts of the instant case and doesn't call for a determination that such items as rent receipts and telephone bills are instrumentalities of the crime of accepting wagers without a tax stamp.

This Court has apparently been reluctant to give *Marron* its full force and effect, rather, its general rule has been sparingly applied and exceptions to it more frequently made.

see *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931);
United States v. *Lefkowitz*, 285 U. S. 452.

As Chief Judge Sobeloff points out in his vigorous dissent in *United States* v. *Boyette*, 299 F. 2d 92, 97 (1962), "In light of these two later cases, it is apparent that *Marron* has been severely damaged if not destroyed, as authority for a general rule that would treat records as instrumentalities of crime." The Chief Judge cites with approval, however, *Gouled* v. *United States*, 255 U. S. 298 (1921) which

seems to set a reasonable and workable distinction between the legitimate use of a search warrant and the use which violates a citizen's rights under the Fourth and Fifth Amendments.

Search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making a search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken." 255 U. S. p. 309.

Viewed in the light of *Gouled, Go-Bart Importing Co.*, and *Lefkowitz*, it cannot be seriously disputed that the evidence in question was seized solely as evidence to be used against petitioner and for no other constitutionally sanctioned purpose.

Agent Ryan's admission that he found the telephone bills "on top of the dresser *among other personal effects*" (italics ours) (R. 301), is graphic evidence that the seizure violated petitioner's rights under the Fourth and Fifth Amendments.

Petitioner therefore, urges this Court, if *Marron* can be interpreted as holding to the contrary, to reconsider the case in view of the foregoing decisions of this Court.

Furthermore, the admission of these items into evidence was not harmless error. The government had to prove that

the telephone and apartment belonged to petitioner. It sought to do so by convincing the jury that the names on the bills and receipts were fictitious and that petitioner listed the telephone and apartment in these names so that he could conceal his alleged gambling operation, a fact from which willfullness could be inferred.* Agent Ryan testified that the phone bills were found among petitioner's personal effects and he questioned petitioner about the names on the papers and a telephone company employee witness for the government testified that 336-0254 at Apt. C-6 was listed to a Peggy Donofrio (R. 151). All these circumstances bearing on crucial issues must have been given some consideration by the jury.

Obviously, the government considered the fact that the telephone was listed in the name of Peggy Donofrio and that no person by that name lived at Apt. C-6, extremely important since this allegation is made to support probable cause *in both the search warrant affidavit and the complaint for arrest* (A. 7a, 13a).

The test to be applied as to whether the admission of unconstitutionally seized evidence is prejudicial error has been recently set forth by this Court.

> "The question is whether there is a reasonable *possibility* that the evidence complained of *might* have contributed to the conviction." (Italics ours.)
>
> *Fahy* v. *Conn.*, 375 U. S. 85, 86, 87 (1963).

---

* The lower court's reason for finding the rent receipts "particularly insignificant" (P.A. 7a, footnote 3) is unclear since the secretary testified on direct examination that "many times people pay other people's rent" and the receipts are made out "to the person the apartment is listed under" (R. 152) and later on cross-examination, that she did not know for a fact whether petitioner lived at apartment C-6 (R. 155).

That it was not harmless error to admit this evidence is illustrated by the conclusion of the Court in *State* v. *Miller*, 152 C. 343, 349 (1965):

> "Where a conviction depends upon the unanimous vote of twelve members of the jury, it would be a rare case where an appellate court could say that there was no reasonable possibility that a given piece of evidence did not contribute to the finding of guilty."

VI.

The conscious generation of publicity surrounding the events of October 8 is particularly significant because it demonstrates that the government was controlling conduct which the Constitution left to the responsibility of the states.

Although *Kahriger* upheld the constitutionality of these statutes as revenue measures, the Court was not confronted with vivid evidence, as appears in the instant case, of the use of the statutes by the government and by the trial court as merely an assault on gambling in Connecticut.

In *United States* v. *Calamaro*, 354 U.S. 351, 358 (1957) this Court noted that, "The statute was passed and its constitutionality was upheld, as a revenue measure, and apart from all else in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."

Compared in the light of the foregoing is the remark of the trial court made prior to imposition of sentence upon Costello, Marchetti, Gjanci and Piccioli on January 11, 1965.

> "While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling" (P.A. 33a).

Again, immediately prior to imposing the maximum sentence and fine permissible under Count I upon petitioner the trial court commented at great length, (R. 406-422) (P.A. 34a) about "what has been accomplished by this latest federal crackdown upon gambling and organized crime".

It was Justice Frankfurter's opinion that these statutes were actually "verbal cellophane" which permitted Congress to "control conduct which the Constitution left to the responsibility of the states". 345 U.S. p. 38.

Petitioner submits that this "verbal cellophane" has been stripped away in the instant case by the fashion in which the statutes were enforced by the government and by the trial court's statements "in the prosecutorial area beyond his function." (P.A. 35a)

Practically every phase of the mass arrests was calculated by the government to and did produce publicity which saturated the state of Connecticut, which the Court below characterized as "needless intensification" (P.A. 39a).

While it is true, that no motions directed at publicity were made in the instant case until after verdict, it should be mentioned that petitioner's trial was the fourth in a series of trials resulting from the raid of October 8, and that his jury, selected on December 1 did not hear his case until January 5, 1965, after the Marchetti, Gjanci, Costello

and Piccioli trials were completed. (A. 3a) Prior to the commencement of the first trial, counsel for Grassia, *United States* v. *Grassia*, —— F. 2d —— (1965) made the trial court keenly aware of the prejudicial pre-trial publicity which had been generated by the government, (P.A. 37a) in his motion for dismissal of the indictment or a continuance. Subsequently, before Costello's trial began, his counsel moved for a mistrial because of prejudicial newspaper publicity, which motion was denied (P.A. 21a) and on December 15 Piccioli's motion for a new jury or a continuance was likewise denied. (P.A. 30a)

When the instant case was reached for trial before the same trial court, counsel for petitioner did not reiterate or pursue these motions, in view of the fact that the court had turned deaf ears to those previously made. Petitioner submits that denial of such motions, if made by petitioner, was virtually a certainty. In a realistic sense, there is no reason to suppose that petitioner would have succeeded where others had failed and under the unusual circumstances surrounding these trials the formality of making the motions might be deemed to have been unnecessary. See *U. S.* v. *Viale*, 312 F. 2d 595, 601 (2 Cir. 1963).

Petitioner accordingly submits that his conviction should be reversed on the basis that the statutes here involved, have been enforced both prosecutorily and judicially so as to control conduct which the Constitution has left to the States in violation of the Tenth Amendment, or since there is every indication that the government was the sole producing agent of the prejudicial publicity, on the basis of this Court's exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law," *Marshall* v. *United States*, 360 U.S. 310, 313 (1959).

CONCLUSION

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

CHARLES HANKEN
PHILIP BAROFF
240 Fairfield Avenue
Bridgeport, Connecticut

ALFRED BELINKIE
1016 Broad Street
Bridgeport, Connecticut

Counsel for Petitioner